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IN THE

Supreme Court of the United States

BRIAN LARA,
PETITIONER

v.

STATE FARM FIRE & CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

An employee became injured resulting in the injury constituting a disability as defined by the Americans with Disabilities Act, ("ADA") 42 U.S.C. § 12101, *et seq.* The employee required leave to recover from his injury and return to work and exhausted all of his available sick leave as well as all of the leave to which he was entitled under the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* When all of his available illness benefits had expired, employee requested his employer provide him additional unpaid leave as a reasonable accommodation under the ADA. However, employer had a company illness benefits expired policy which provided that any employee who exhausted their available sick leave but could not return to work without limitation would be terminated. When employee's sick leave was exhausted and he could not return to work without limitation, employee's request for additional leave was denied and his employment was terminated based upon the illness benefits expired policy. The Tenth Circuit Court of Appeals held that the employee's request for additional leave was not a reasonable accommodation request because the employee failed to provide employer with the expected duration of his impairment.

When an employee requests leave as a reasonable accommodation under the ADA, must the employee provide his employer with the expected duration of his impairment for that request to be considered reasonable?

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The Tenth Circuit Opinion dated January 27, 2005 is published at *Lara v. State Farm Fire & Casualty Co.*, No. 03-3248, 121 Fed.Appx. 796, 2005 U.S. App. LEXIS 1341 (10th Cir. 2005), and is attached hereto at Appendix (App. p. 1a). The District Court Opinion dated July 23, 2003 is published at *Lara v. State Farm Fire & Casualty Co.*, No. 02-1308-WEB, 2003 U.S. Dist. LEXIS 16348 (D.Kan. 2005), and is attached hereto at App. p. 17a. The Tenth Circuit Order Denying Rehearing filed February 17, 2005 is attached hereto at App. p. 51a.

BASIS FOR JURISDICTION

This is an action for wrongful termination and failure to accommodate brought pursuant to Title I of the Americans with Disabilities Act, 42 U.S.C. 12101, *et seq.* The district court had subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331. On July 24, 2003, the district court granted the motion for summary judgment of State Farm. Final judgment was entered against Lara on that same date as to all claims in this case.

On August 14, 2003, Lara filed his notice of appeal from the district court's decision granting State Farm's motion for summary judgment. On January 27, 2005, the Tenth Circuit Court of Appeals affirmed the decision of the district court granting State Farm's motion for summary judgment. Lara filed a timely motion for reconsideration on February 10, 2005. That motion was denied on February 17, 2005. This Court has jurisdiction over this petition for writ of certiorari pursuant to 28 U.S.C. §1254(a) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, REGULATIONS INVOLVED

42 U.S.C. § 12111

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include--(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar

> accommodations for individuals with disabilities.

42 U.S.C. § 12112

> a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF CASE

This case arises out of the ADA, alleging a failure to accommodate and wrongful termination. Lara was a Fire Claims Representative for State Farm when he suffered a burst fracture of one of his vertebrae while off work. Lara had multiple surgeries to try to repair this burst fracture, the last on February 9, 2002. Prior to his final surgery, Lara asked State Farm about granting him additional unpaid leave when his illness leave expired. At that time, State Farm's policy provided that any employee whose illness benefits expired must be able to return to work without restrictions or the employee would be terminated. State Farm did not ask Lara for additional information in order to consider his request for additional leave nor did State Farm ask Lara or Lara's physician for any information as to the expected duration of his impairment.

While recovering from the February 2001 surgery, Lara's sick leave with State Farm expired. When that occurred, State Farm denied Lara's request for additional leave and terminated his employment. Steve Short, Vice President of Operations for State Farm, made the decision to terminate Lara's employment. He knew at the time of that decision that Lara was suffering from a disability but did not know Lara had requested additional leave as an accommodation. Nonetheless, Short believed that State Farm's policy required Lara's termination since Lara could not return to work without restrictions at that time. Short did not believe that he or anyone at State Farm could make an exception to that policy.

Lara filed a timely complaint with the Equal Employment Opportunity Commission which ultimately issued Lara a right to sue letter. Lara filed this suit in federal district court asserting that his termination by State Farm violated the ADA by discriminating against him because of his disability. Lara sought both monetary damages and injunctive relief, seeking to have State Farm's illness benefits expired policy declared in violation of the ADA. The district court granted State Farm's motion for summary judgment and Lara appealed that decision to the Tenth Circuit Court of Appeals. The Tenth Circuit affirmed the district court and refused to reconsider its decision. This petition for writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. The Court Should Address This Important Issue To Provide Guidance and Certainty to Employers and Employees As Well As Lower Court Evaluating Requests for Leave as an Accommodation under the ADA.

The issue of when leave is an appropriate accommodation under the ADA is arising with increasing frequency. The Family and Medical Leave Act ("FMLA") requires certain employers grant eligible employees twelve work weeks of leave in a twelve month period if the employee has a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). However, this amount of leave is not always sufficient for an employee with a disability to recover adequately to return to work. *See, e.g., Rascon v. U.S. West Communications*, 143 F.3d 1324 (10th Cir. 1998)(employee required four months treatment for in-patient posttraumatic stress disorder treatment). Thus, cases are arising where employees have requested leave as an accommodation under the ADA beyond that the amount of leave required by the FMLA. *Id.*

Further, an employee must have a substantial impairment of one or more major life activities in order to satisfy the test of having a "disability" under the ADA. 42 U.S.C. § 12102(2)(A). Because of the severity of their impairment, many of these employees require temporary leave in order to recover from their disability and return to work. Thus, requests for leave as a reasonable accommodation under the ADA will continue to arise with increasing frequency.

With leave becoming increasingly more important as a reasonable accommodation under the ADA, it is important for this Court to establish clear guidelines for employers and employees to establish how employees must make those leave requests. Employees must understand how such requests are to be made so as to have their requests evaluated fairly on their merits and not rejected for mere technical reasons. Employers need to know what degree of specificity they are permitted to require in requests for leave from their employees. Lower courts need guidance on how to evaluate whether an employee has made an acceptable request for leave as an accommodation under the ADA.

This Court has not spoken to the issue of when an employee's request for leave can constitute a reasonable accommodation under the ADA. Thus this case raises a question of first impression for this Court. The vast majority of cases involving the ADA which this Court has chosen to address have concerned the appropriate scope of the term "disability" as used in the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002). *But see U.S. Airways v. Barnett*, 535 U.S. 391 (2002). The Court should take this opportunity to issue authoritative guidance to employers, employees and lower courts as they struggle with questions of how to consider requests for leave as a reasonable accommodation.

II. The Holding in This Case So Conflicts With A Decision of the First Circuit Court of Appeals As Well As the Underlying Philosophy of the Americans with Disabilities Act That This Court Should Act To Resolve That Conflict.

The Tenth Circuit Court of Appeals has imposed a particularly harsh rule for employees when requesting leave as an accommodation under the ADA. In previous decisions, the Tenth Circuit Court of Appeals has required employees show evidence as to the expected duration of their impairment in order to show that their request for leave was not unreasonable. *See Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998). However, in the instant case, the court went beyond and required that even if the employer had evidence of the expected duration of the employee's impairment, the request for leave was not reasonable unless the source of that information was the employee or his physician. *Lara*, at *16 (Appendix 13).

This holding in is conflict with a ruling from the First Circuit Court of Appeals. In *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), the court did not require the employee to provide her employer with an estimate of the expected duration of her impairment, holding instead that such was simply a factor to consider in determining whether a request for leave was reasonable. *Id.*, at 650. Rather than viewing the amount of information provided by the employee as one of a number of factors to be considered, the Tenth Circuit has made the source of the information the sole dispositive factor.

Other courts of appeals have required that the amount of leave requested by the employee cannot be too indefinite. *See id., citing Watkins v. J&S Oil Co.*, 164 F.3d 55, 62 (1st Cir. 1998); *Corder v.Lucent Technologies Inc.*, 162 F.3d 924, 928 (7th Cir. 1998); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (11th Cir. 1997) (per curiam); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755 759-60 (5th Cir. 1996). However, no other court of appeals has imposed the requirement that employee must provide the employer with the expected duration of his impairment in order to have his request for leave be considered a proper request for a reasonable accommodation under the ADA. The Tenth Circuit's holding in the instant case therefore places it at odds with the other U.S. circuit courts of appeals.

The harsh rule set down by the Tenth Circuit Court of Appeals here is contrary to basic underlying philosophy of the ADA. It is well settled that an employee requesting a reasonable accommodation under the ADA need not use any magic words in order to invoke the ADA's protection. *See, e.g Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1282 (7th Cir. 1996). Indeed, an employer must often engage in an interactive process with the employee in order to satisfy its duty to provide a reasonable accommodation. *Taylor v. Phoenixville School District*, 184 F.3d 296, 319-20 (3rd Cir. 1999). In such a process, the amount of information the employee must provide is dependent upon what the employer already knows. *Id.*

The holding of the Tenth Circuit in the instant case is contrary to that philosophy. If the holding in the instant case is allowed to stand, many employees seeking additional leave as a reasonable accommodation under the

ADA will fail to provide their employer with the expected duration of their impairment simply because they are unaware of their obligation to do so; yet, their requests for accommodation may be rejected by their employer because they failed to provide the required information with their request. As such, their efforts to seek a reasonable accommodation will fail without ever being considered on the merits. Further, some employers may not ask the employee for the expected duration of the impairment, either because their own medical staff will make that assessment or because they wish to take unfair advantage of employees who may unwittingly omit the expected duration of their impairment from their request for leave. In still other cases, employers may have no interest the expected duration of the employee's impairment because that information is irrelevant to their consideration of the employee's request for leave.

The instant case is an example of such extreme situations and illustrates the harshness of the Tenth Circuit's rule. In this case, State Farm did not ask Lara for any information about the expected duration of his impairment. Instead, it is uncontroverted that State Farm made its own evaluation of that issue by its medical director, Dr. Kindred. Further, it is uncontroverted that Steve Short, Vice President of Operations for State Farm, was not aware that Lara had requested additional leave as a reasonable accommodation. He terminated Lara because he did not believe that he or anyone at State Farm could grant Lara additional leave once his illness benefits had expired. Yet in this case, the Tenth Circuit Court of Appeals determined that Lara was not entitled to additional leave as a reasonable accommodation, holding "Because Mr. Lara failed to provide evidence to State Farm of the expected duration

of his impairment prior to his termination, the court finds that Mr. Lara has failed to create a triable issue of fact as to the reasonableness of the requested leave." *Lara*, at *17 (Appendix 13) *citing Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000).

This conflict is on a significant issue which requires resolution by this Court. The rule applied in the instant case by the Tenth Circuit allows employers to reject requests for accommodations simply because the employee has not provided information as to the expected duration of his impairment. Employers in other circuits must nonetheless engage in an interactive process with the employee to determine if the leave requested as an accommodation is reasonable. Employers with employees in multiple states thus have different burdens imposed upon them when reviewing requests for leave, depending upon the location of the employee. More importantly, employees in the Tenth Circuit now find their ability to request leave as a reasonable accommodation under the ADA more difficult than employees anywhere else in the country. The holding in this case by the Tenth Circuit not only conflicts with prior decisions in other circuit courts of appeals but conflicts with and undermines the basic remedial goals of the ADA itself. This Court should settle these conflicts by granting Lara's petition for writ of certiorari and issuing clear guidance to all as to whether an employee's request for leave as a reasonable accommodation may be summarily rejected by an employer if the request fails to include information on the expected duration of the impairment.

CONCLUSION

The Tenth Circuit Court of Appeals has established a harsh requirement for employees seeking to request leave as a reasonable accommodation under the ADA which goes beyond the requirements established by any other U.S. circuit court of appeal. This case demonstrates how such a harsh rule is contrary to the principles underlying the ADA. This Court should exercise its discretion to issue a writ of certiorari in this case and use this case as an opportunity to issue clear guidelines for employers and employees, as well as the lower courts, on this important issue which will continue to arise with increasing frequency.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-3248

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIAN LARA,
Plaintiff-Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY,
Defendant-Appellee.

January 27, 2005, Filed

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For STATE FARM FIRE AND CASUALTY COMPANY, Defendant - Appellee: Joseph R. Colantuono, Katherine A. Worthington, Colantuono & Associates, Leawood, KS.

JUDGES: Before McCONNELL, McKAY, Circuit Judges, and FRIOT, District Judge. **

OPINION BY: Stephen P. Friot

OPINION: ORDER AND JUDGMENT *

Plaintiff, Brian Lara, appeals from the district court's grant of summary judgment for Defendant, State Farm

Fire & Casualty Company (State Farm), on his claims under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background

Mr. Lara was an employee of State Farm for approximately twelve years. His employment was terminated on February 16, 2002. At the time of his termination, Mr. Lara held the position of Fire Claims Specialist (also referred to in Mr. Lara's brief as Fire Claims Representative) in Wichita, Kansas.

State Farm Fire & Casualty Company handles damage claims covered under homeowners' policies, such as wind, hail, water, fire, theft, vandalism and third party liability.

State Farm's job description for the position held by Mr. Lara states that the individual in this position consistently demonstrates effectiveness in a number of skills and abilities, including the ability to "Inspect Property and Casualty claims which could include obtaining the measurements of the roof and living areas, the inspection of attics, basements, crawl spaces and other claim locations as applicable (requires walking, climbing, bending, reaching, stooping, crawling and lifting objects typically weighing less than 50 lbs.)."

On May 23, 2001, Mr. Lara sustained a back injury in a non-work-related accident, necessitating surgery. Mr. Lara underwent three back surgeries. The final surgery was performed on February 9, 2002. From May

of 2001 through February, 2002, Mr. Lara used over 130 full days of paid sick leave.

State Farm had a policy which provided that "once PSL [Paid Sick Leave] and /or ML [Medical Leave] expires, the employee should be terminated [on grounds of] Illness Benefits Expired . . . since it has already been determined that there will not be a return to work." On January 11, 2002, Mr. Lara had a conversation with Scott Emeola, a State Farm human resources representative. During the conversation, Mr. Emeola told Mr. Lara that "once [your] PSL runs out and [you] can't return to work without restrictions, [your] employment is terminated."

State Farm also had a policy which provided that "if an employee believes an accommodation of a physical . . . impairment is needed to perform his . . . job, the employee should complete an Accommodation Request Form." State Farm required all accommodation requests to be made in writing to the ADA Accommodation Request Review Committee. Dr. Stephen Kindred, State Farm's medical director, was a member of the committee. Dr. Kindred's role was to serve as a medical consultant and to evaluate medical information presented.

On approximately January 11, 2002, Mr. Lara submitted a Regional Office Accommodation Request Form. On the form, he requested an accommodation of "no roof claims until directed by the doctor." On page 2 of the form, Mr. Lara stated that his "physical impairment is temporary" and that he could complete all job functions except carry a ladder and inspect and climb on roofs.

State Farm's ADA Accommodation Request Review Committee reviewed Mr. Lara's accommodation request on February 5, 2002. However, the committee did not make a decision on the requested accommodation because Mr. Lara required additional surgery on February 9, 2002. When the committee reviewed Mr. Lara's request, it understood that Mr. Lara would be out of work for at least three months.

Mr. Lara had a conversation with Mr. Emeola on February 4, 2002 regarding whether Mr. Lara, after his upcoming surgery, would be eligible for unpaid medical leave when his paid sick leave expired. During the conversation, Mr. Lara asked Mr. Emeola whether he could use his accrued vacation time once his paid sick leave was exhausted. Thereafter, Mr. Emeola sent an e-mail to Annette Jackson, a State Farm human resources consultant, asking whether Mr. Lara could be given any additional leave once his paid sick leave was exhausted. Ms. Jackson replied that she was not in favor of making an exception to the illness benefits expired policy for Mr. Lara. Ms. Jackson had subsequent conversations about this subject with Mr. Emeola and Kelly Winslow, a State Farm assistant human resources manager, and repeated her opinion that an exception to the policy should not be made for Mr. Lara. Ms. Jackson testified in her deposition that they "weren't anticipating a return to work for approximately three months."

On February 13, 2002, Ms. Winslow sent an e-mail to Mr. Emeola stating that she understood that Mr. Lara's surgery on February 9 appeared to be successful and that "he would be back to work in a few months." On that same day, Todd Osborne, fire claim section

manager, sent an e-mail to Bill Rieker, fire claim manager, recommending that Mr. Lara be terminated because his paid sick leave had run out and he was unable to return to work without restrictions. In that e-mail, Mr. Osborne stated that "[Mr. Lara] will not be able to return to work without significant restrictions for an unknown amount of time. The most probable time period before he could perform all the Field Claim Representative job description is 3-6 months from now, although it is not known if he will ever be able to perform this job without restrictions."

After his third surgery on February 9, 2002, Mr. Lara could not carry a ladder, climb on roofs, stoop, crawl or sit at a desk and complete paperwork for a full workday.

Mr. Lara was terminated on February 16, 2002 because his illness benefits had expired and he was not able to return to work without restrictions. Steve Short, Vice President of Operations, made the final decision to terminate Mr. Lara's employment. Mr. Short knew at the time he made the decision, Mr. Lara was suffering from a disability. Mr. Short was not aware that Mr. Lara had requested additional leave in lieu of his termination. Mr. Short did not believe that he or anyone else at State Farm had any authority to grant Mr. Lara unpaid leave instead of terminating him when his illness benefits expired.

At the time of his termination, Mr. Lara had 252 hours of vacation time and 18.5 hours of personal time remaining. State Farm had a policy which precluded an employee from using paid vacation or personal time in

lieu of paid sick leave. Mr. Lara was paid in full for his unused and accrued vacation and personal time.

On February 19, 2002, Mr. Emeola, Mr. Osborne and Rick Beckler went to Mr. Lara's house to inform him that his employment with State Farm was terminated. During this meeting, Mr. Lara again asked whether he could be granted medical leave or take his accrued vacation time rather than be terminated. Mr. Emeola replied that neither option was allowed under State Farm policies.

At the time of his termination, Mr. Lara was unable to perform the essential duties of a fire claims specialist or fire claims representative. From February 16, 2002 until May 13, 2002, the period for which Mr. Lara received disability benefits, he was unable to perform the essential duties of his job.

Prior to his termination, Mr. Lara discussed with Mr. Emeola his interest in finding another position at State Farm. Specifically, he expressed interest in a newly-created position: Field Compliance Coordinator. Opportunities in that position were posted in February of 2002. Mr. Lara was not given one of those positions.

State Farm hired an individual to fill the opening created by Mr. Lara's termination. The individual who was hired commenced her employment in June of 2002. This individual was required to complete 3 to 4 months of training before handling claims.

Mr. Lara's treating physician, Dr. Raymond Grundmeyer, III, testified in his deposition that Mr. Lara was first able to return to work in an office setting

on May 15, 2002. He testified that Mr. Lara could return to work with the following restrictions: (a) frequent or repetitive lifting, pushing, pulling, a maximum of 10 pounds; (b) occasional lifting, pushing, pulling, a maximum of 20 pounds; (c) no prolonged sitting, standing, walking; (d) no excessive and/or repeated bending or twisting of the lower back; and (e) no kneeling, squatting, stooping, crawling and climbing.

From May 2002 to August 2002, State Farm had several positions open in Wichita. These included Agency Specialist positions in May and August, 2002, as well as Automotive Claims Specialist positions in June of 2002.

On August 8, 2002, Mr. Lara underwent a functional capability evaluation at Health South Rehabilitation Clinic. The results showed that as of that date Mr. Lara could perform light work for 8 hours per day.

II. Standard of Review

We review the district court's grant of summary judgment *de novo*, viewing all evidence and any reasonable inferences that may be drawn therefrom in a light most favorable to the non-moving party. *Croy v. Cobe Laboratories, Inc.*, 345 F.3d 1199, 1201 (10th Cir. 2003). Summary judgment is appropriate only when the moving party shows there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 557 (10th Cir. 1994). To avoid summary judgment, the non-moving party "must establish, at a minimum, 'an inference of the existence of each element essential to the case.'" *Boykin v. ATC/VanCom of*

Colorado, L.P., 247 F.3d 1061, 1063 (10th Cir. 2001)(quoting *Hulsey*, 43 F.3d at 557). The non-moving party "'may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial.'" *Hulsey*, 43 F.3d at 557, (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)).

III. Discussion

Under the ADA, employers are prohibited from discriminating against "a qualified individual with a disability" in employment actions. 42 U.S.C. § 12112(a). The ADA defines a "qualified individual" as an employee who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). To qualify for relief under the ADA, a plaintiff must establish that: (1) he is a disabled person within the meaning of the ADA; (2) he is qualified, that is, with or without reasonable accommodation, he is able to perform the essential functions of the job; and (3) the employer terminated him because of his disability. *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).

In the case before us, the district court found that Mr. Lara had demonstrated a genuine issue of fact as to his disability. This court, for purposes of summary judgment review, assumes that Mr. Lara has established the first element of his claim. We therefore turn to the second element, whether he is qualified.

This court has applied a two-part test for determining whether a person is qualified within the meaning of the ADA:

> First, we must determine whether the individual could perform the essential functions of the job, i.e. functions that bear more than a marginal relationship to the job at issue. Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

Cisneros v. Wilson, 226 F.3d 1113, 1128-29 (10th Cir. 2000)(quoting *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1168 (10th Cir. 1996)(other citations omitted)), *overruled on other grounds*, *Board of Trustees v. Garrett*, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001).

The record reveals that, at the time he was terminated, Mr. Lara could not perform the essential functions of his position as Fire Claims Specialist or Fire Claims Representative. However, Mr. Lara argues that he is a "qualified" individual because there was a reasonable accommodation available which would have enabled him to perform his position. Specifically, Mr. Lara claims that State Farm should have provided him with three to six months of additional leave.

"It is well-settled that a request for leave may lead to a 'reasonable' accommodation - such a request may allow

an employee sufficient time to recover from an injury or illness such that the employee can perform the essential functions of the job . . . in the future." *Cisneros*, 226 F.3d at 1129. The term "reasonable accommodation," however, refers to "'those accommodations which presently, or in the *near future*, enable the employee to perform the essential functions of his job.'" *Id.* (quoting *Hudson*, 87 F.3d at 1169)(emphasis in original). A request for indefinite leave therefore cannot constitute "reasonable accommodation" as "such a leave request does not allow the employee to perform the essential functions of the job in the *near future*." *Id.* (emphasis in original).

As stated, Mr. Lara contends that State Farm should have provided him with three to six months of additional leave. However, Mr. Lara's request for additional leave, as found by the district court, was essentially a request for an indefinite leave. There is no evidence in the record establishing that State Farm had reliable information in hand, prior to Mr. Lara's termination, as to the expected duration of Mr. Lara's *impairment*. "This court has required an employee to provide an *expected duration of the impairment* (not the duration of the leave request)." *Cisneros*, 226 F.3d at 1130 (emphasis in original). There was no medical assessment provided to State Farm by Mr. Lara as to when he would be able to return to work and perform all the essential functions of his job. In his appellate briefing, Mr. Lara states his request was not indefinite because State Farm, at the time of termination, understood Mr. Lara would be able to return to work in three to six months. Mr. Lara specifically relies upon the e-mail by Mr. Osborne wherein he wrote that "the most probable time period before [Mr. Lara] could

perform all the Field Claim Representative job description is 3-6 months from now . . . ." Defendant-Appellee's Supplemental Appendix - Volume I, p. 188. However, Mr. Osborne testified in deposition that this time estimation was his own and was based on the amount of time that Mr. Lara was gone from his first surgery. Defendant-Appellee's Supplemental Appendix -Volume III, p. 434-35, Deposition of Todd Osborne, p. 56, ll. 17-25, p. 57, ll. 1-4. Mr. Lara also relies upon Ms. Jackson's deposition testimony that "we weren't anticipating a return to work for approximately three months." Defendant-Appellee's Supplemental Appendix - Volume II, p. 296, Deposition of Annette Jackson, p. 56, ll. 6-8. However, there is no indication in the record as to the basis for this testimony or as to any reason that we should conclude, in the face of her contemporaneous e-mail (discussed below), that this brief passage suffices to raise a triable issue of fact as to the state of the employer's knowledge, at the time of the events in question, as to the probable duration of Mr. Lara's disability. In her e-mail to Mr. Emeola on February 5, 2002, four days prior to Mr. Lara's surgery, Ms. Jackson stated that "with a totally unknown recovery period, I'm not in favor of an exception to [the illness benefits expired policy]." Defendant-Appellee's Supplemental Appendix - Volume I, p. 196. There is evidence in the record of an e-mail from Ms. Winslow on February 13, 2002, that Mr. Lara "would be back to work in a few months," and deposition testimony from Dr. Kindred, the medical consultant to the ADA Accommodation Request Review Committee, that Mr. Lara "would be out of work at least three months." Defendant-Appellee's Supplemental Appendix - Volume II, p. 248 and p. 341, Deposition of Stephen Lee Kindred, M.D., p. 16, ll. 1-7. There is no indication as to

whether this information came from Mr. Lara, after discussions with his physician, Dr. Grundmeyer, or from Dr. Grundmeyer himself. Mr. Lara testified in deposition that Dr. Grundmeyer had not given him an approximate recovery date prior to his surgery and that he could not recall if Dr. Grundmeyer had given him an approximate recovery date after surgery. Defendant-Appellee's Supplemental Appendix - Volume I, p. 61, Deposition of Brian Lara, p. 149, ll. 17-25, p. 150, l. 1. In his deposition, Dr. Grundmeyer testified that as of February 22, 2004, Mr. Lara's "end date/release to work date" was unknown and that "three months is a better time frame for evaluation." *Id.* at pp. 78-79, Deposition of Raymond Grundmeyer, III, M.D., p 52, ll. 19-25, p. 53, ll. 1-11.

Rascon v. U.S. West Communs., 143 F.3d 1324 (10th Cir. 1998), relied upon by Mr. Lara in briefing, is distinguishable from this case. In that case, the employee, prior to leaving employment to receive in-patient posttraumatic stress disorder treatment, told his supervisor the expected duration of his treatment was estimated at four months. In addition, the employee's treating physician provided a report indicating that the employee needed approximately four months to complete treatment. The employee's prognosis from his physician was also "good." *Rascon*, 143 F.3d at 1334. In this case, there is no evidence that State Farm was provided any information from Mr. Lara or Dr. Grundmeyer prior to termination of the expected duration of Mr. Lara's impairment. Nor is there any evidence in the record from Dr. Grundmeyer as to Mr. Lara's prognosis.

As we stated in *Cisneros*, "without an expected duration of the impairment, an employer cannot determine whether the employee will be able to perform the essential functions of the job *in the near future* and therefore whether the leave request is a 'reasonable' accommodation." *Cisneros*, 226 F.3d at 1130 (emphasis in original). Because Mr. Lara failed to provide evidence to State Farm of the expected duration of his impairment prior to his termination, the court finds that Mr. Lara has failed to create a triable issue of fact as to the reasonableness of the requested leave. *Id.*

Mr. Lara also claims that State Farm failed to accommodate his disability because it failed to transfer or reassign him to a vacant position. Where ADA relief is sought on this basis, plaintiff must show (in addition to ADA disability and performance capability) that the employer did not take reasonable steps to reassign the plaintiff to a vacant position or to a position the employer reasonably anticipated would become vacant in the "fairly immediate future." *Bartee v. Michelin North America, Inc.*, 374 F.3d 906, 912 n. 4 (10th Cir. 2004). In *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999), the Tenth Circuit stated as follows:

> "[A] vacant position" includes not only positions that are at the moment vacant, but also, includes positions that the employer reasonably anticipates will become vacate in the fairly immediate future. *See, Monette* [*v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1187 (6th Cir. 1996)] ("If, perhaps, an employer knows that a position for which the disabled applicant

> is qualified will become vacant in a short period of time, the employer may be required to offer the position to the employee."); *see also*, EEOC Guidance [Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act], at 39 (" 'Vacant' means that the position is available when the employee asks for reasonable accommodation, or that the employer knows that it will become available within a reasonable amount of time.")

Id. at 1175; *see also*, *Bristol v. Board of County Commissioners of the County of Clear Creek*, 281 F.3d 1148,1168 (10th Cir. 2002)(quoting 29 C.F.R. pt. 1630, App., § 1630.2(*o*) "if 'the employer . . . *knows* that an equivalent position for which the individual is qualified [] will become vacant next week,' then that position should be considered "vacant" and the employer may have a duty to reassign the employee to that position when it becomes available") (emphasis in original), *vacated in part on other grounds*, 312 F.3d 1213 (10th Cir. 2002) (*en banc*).

In the instant case, Mr. Lara claims that there were a number of positions open in Wichita in May, June and August of 2002 for which he was qualified. However, as the district court properly found, there is an absence of any evidence in the record that State Farm knew of any of these positions when Mr. Lara was terminated. *See*, *Bristol*, 281 F.3d at 1168 ("[*Midland Brake*] makes clear that [an] aspect of whether a position is vacant involves the employer's subjective knowledge of upcoming opening.") There is no evidence in the record

that State Farm knew or reasonably anticipated that any of the cited positions would be vacant at the time of plaintiff's termination.

Prior to his termination, Mr. Lara had expressed an interest to Mr. Emeola in an assignment to one of the newly-created Field Compliance Coordinator positions (first available in February of 2002). However, there is no evidence in the record that Mr. Lara was able to perform the essential functions of that job at the time it became available. Dr. Grundmeyer testified in his deposition that Mr. Lara was first able to return to an office setting on May 15, 2002. Defendant-Appellee's Supplemental Appendix - Volume I at p. 80, Deposition of Raymond Grundmeyer, III, M.D., p. 64, ll. 4-10. Therefore, Mr. Lara has failed to demonstrate a triable issue of fact with respect to whether there was a vacant position to which State Farm did not take reasonable steps to transfer or reassign him.

In sum, the record before the district court did not raise a triable issue as to Mr. Lara's termination and failure to accommodate claims under the ADA. The district court therefore correctly granted State Farm's motion for summary judgment on Mr. Lara's claims.

Entered for the Court

Stephen P. Friot
District Judge

Footnotes

** The Honorable Stephen P. Friot, United States District Judge for the Western District of Oklahoma, sitting by designation.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Case No. 02-1308-WEB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRIAN LARA,
Plaintiff,

v.

STATE FARM FIRE & CASUALTY COMPANY,
Defendant.

July 24, 2003, Decided

COUNSEL: For Brian Lara, Plaintiff: Rick E. Bailey, Morris Laing Evans Brock & Kennedy Chtd, Wichita, KS, LEAD ATTORNEY.

For State Farm Fire & Casualty Company, Defendant: Joseph R. Colantuono, Colantuono & Associates LLC, Leawood, KS, LEAD ATTORNEY.

For State Farm Fire & Casualty Company, Defendant: Katherine A. Worthington, Colantuono & Associates LLC, Leawood, KS, LEAD ATTORNEY.

JUDGES: Wesley E. Brown, United States Senior District Judge.

OPINION BY: Wesley E. Brown

OPINION:

MEMORANDUM AND ORDER

Plaintiff Brian Lara alleges that his former employer, defendant State Farm Fire & Casualty Company, discriminated against him on account of a disability in violation of *Title I of the Americans with Disabilities Act* ("ADA"). The matter is now before the court on State Farm's Motion for Summary Judgment. The court finds that oral argument would not assist in deciding the issues presented. For the reasons that follow, the court concludes that State Farm's motion for summary judgment must be granted.

I. *Facts.*

Plaintiff Brian Lara is a former employee of State Farm and currently resides in Wichita, Kansas. State Farm employed Lara for approximately twelve years. At the time of his termination, State Farm employed Lara as a fire claims specialist or fire claims representative in Wichita, Kansas. Lara was terminated on February 16, 2002.

On or about May 23, 2001, plaintiff injured his back in a non-work-related dune buggy accident. From May 2001 through February 2002, plaintiff used over 130 full days of paid sick leave while recovering from his injury.

On September 4, 2001, and September 18, 2001, plaintiff underwent surgery on his back. On February 9, 2002, plaintiff underwent an additional surgery on his back.

As of February 9, 2002, plaintiff could not carry a ladder, climb on roofs, stoop, crawl or sit at a desk and complete paperwork for a full workday. On February 16, 2002, the date of plaintiff's dismissal, plaintiff was

unable to perform the job of a field claim representative.

From February 16, 2002, through May 13, 2002, the period for which plaintiff received disability insurance benefits, he was unable to perform the essential duties of his occupation.

State Farm's Fire & Casualty Company handles all types of property and casualty claims other than automobile claims. These include various types of damage claims covered under homeowners' policies, such as wind, hail, water, fire, theft, vandalism, and damage involving third party liability.

State Farm's Fire & Casualty Company's job description for the position of claim inspector states that an individual in this position consistently demonstrates effectiveness in a number of skills and abilities, including the ability to "Inspect Property and Casualty claims which could include obtaining measurements of the roof and living areas, the inspection of attics, basements, crawl spaces and other claim locations as applicable (requires walking, climbing, bending, reaching, stooping, crawling, and lifting objects typically weighing less than 50 lbs."

On or about January 11, 2002, Plaintiff submitted a Regional Office Accommodation Request Form to State Farm. On the form, plaintiff requested "no roof claims until directed by the doctor." On page 2 of the form, plaintiff stated that his "physical impairment is temporary!" Plaintiff also stated on the form that he could complete all job functions except carry a ladder and inspect and climb on roofs.

Todd Osborne, State Farm's Fire Section Manager, completed an ADA Management Questionnaire on January 11, 2002. Osborne answered "Yes" in response to the question, "If allowed, would this accommodation prevent the employee from performing the essential functions of the job?"

After undergoing surgery on February 9, 2002, Plaintiff could not carry a ladder, climb on roofs, stoop, crawl, or sit at a desk and complete paperwork for a full workday. During his deposition, plaintiff conceded that at the time of his termination he was "probably not" able to complete the job of a field claim representative.

On February 5, 2002, State Farm's ADA Accommodation Committee reviewed Plaintiff's Accommodation Request. The Committee did not make a decision on the request because, as noted above, Plaintiff underwent surgery on February 9, 2002.

State Farm terminated Plaintiff because his illness benefits expired February 16, 2002, and he was not able to return to work without restrictions for several months.

State Farm's Human Resources Policy states, "Once PSL [Paid Sick Leave] and/or ML [Medical Leave] expires, the employee should be terminated [on grounds of] Illness Benefits Expired ... since it has already been determined that there will not be a return to work."

At the time of his termination, Plaintiff had 252 hours of vacation time and 18.5 hours of personal time remaining. State Farm's policies state that employees

may not use paid vacation or personal time in lieu of paid sick leave. After his termination, Plaintiff was paid in full for his unused and accrued vacation and personal time.

Dr. Grundmeyer, of the Abay Neuroscience Center and Plaintiff's treating physician, testified that on April 1, 2002 (almost two months after Plaintiff's surgery), he recommended Plaintiff remain off work with no bending, twisting, pushing or pulling.

On February 21, 2002, State Farm received an Employee Medical Certification Form from Plaintiff stating, "End Date/Release to Return to Work: Unknown at this time. Approx. 3 months." The form contained a "Disability/Incapacity Start Date" of February 9, 2002. Dr. Grundmeyer signed the form and also indicated, "Work Restrictions, if any: No work." Plaintiff admitted during his deposition that the form contained the correct restrictions and that he should not have been working at all after February 27, 2002.

On February 27, 2002, State Farm received a Work Release, dated February 18, 2002, from Plaintiff signed by Dr. Grundmeyer. The February 27, 2002, Work Release stated, "May return to work on 2/18/02 without restrictions." Plaintiff persuaded someone at Dr. Grundmeyer's office to sign this February 27, 2002, Work Release and back-date it to February 18, 2002. The Work Release contained false work restrictions because Plaintiff was not able to return to work without restrictions on February 18, 2002. Plaintiff obtained the release because he wanted to keep his job.

On March 1, 2002, State Farm received a second Work Release from Plaintiff signed by Dr. Grundmeyer. This release contained the following restrictions, which were for a period of four weeks:

> a. Frequent or repetitive lifting/pushing/pulling a maximum of 10 pounds.
>
> b. Occasional lifting/pushing/pulling of a maximum of 20 pounds.
>
> c. No kneeling/squatting/stooping/crawling/climbing.

On April 17, 2002, Dr. Grundmeyer signed a Work Release excusing Plaintiff from work, which stated Plaintiff was "Released from work until re-evaluation on 5/15/02."

Dr. Grundmeyer testified during his deposition that Plaintiff was first able to return to work in an office setting on May 15, 2002, three months after his illness benefits expired. He testified that Plaintiff could return to work on May 16, 2002, with the following restrictions:

> a. Frequent repetitive lifting, pushing, pulling, a maximum of 10 pounds;
>
> b. Occasional lifting, pushing, pulling a maximum of 20 pounds;
>
> c. No prolonged sitting, standing, walking;

d. *No excessive and/or repeated* bending or twisting of the lower back;

e. No kneeling, squatting, stooping, crawling, climbing.

On August 1, 2002, Dr. Grundmeyer signed a Work Release which stated Plaintiff was released from work and did not provide a return-to-work date. On August 8, 2002, Plaintiff underwent a functional capacity evaluation at Health South Rehabilitation Clinic. The results showed that as of the date of the evaluation Plaintiff could perform light work for 8 hours per day.

On or about May 14, 2002, Plaintiff received a letter from CIGNA Group Insurance, State Farm's disability insurance carrier stating, "To qualify for benefits under your LTD policy, during the first 24 months you must be unable to perform the essential duties of your occupation." During his deposition, Plaintiff admitted that absent some accommodation he was unable to perform the essential duties of his occupation during this benefit period.

Plaintiff received a check from CIGNA for benefits for the period of February 16, 2002, through May 13, 2002, and was receiving continued monthly checks from CIGNA at the time of his deposition (February of 2003).

Plaintiff's Statement of Additional Uncontroverted Facts.

Plaintiff asserts there are three major life activities which have been substantially limited by his

impairment: lifting, performing manual tasks, and working.

In his accident of May 23, 2001, Plaintiff suffered a burst fracture of his L-1 vertebra. Immediately after the accident, Dr. Trimble placed Plaintiff on restrictions preventing him from working at all. On September 4, 2001, Dr. Trimble performed a L-1 vertebrectomy and fusion from T-12 to L-2 with an anterior approach with a Pyramesh case, and metal screws, rods, and hooks to support the fracture area. On September 18, 2001, Dr. Trimble performed a second surgery using a posterior approach to add additional hooks and rods for more support.

On November 8, 2001, Dr. Trimble released Plaintiff to return to light duty work with lifting restrictions of 10 pounds maximum.

Starting in late January of 2002, Plaintiff's physical condition began to deteriorate. He was forced to use a cane on occasion for assistance in walking. He also suffered from increasing back pain. He was suffering from paralysis in his left leg that caused him to drag it when walking. The paralysis also caused urinary retention which required that Plaintiff catheterize himself on a regular basis. Plaintiff even required assistance with bathing as he was unable to bathe himself.

On February 9, 2002, Dr. Grundmeyer performed redo L-1 vertebrectomy with T-12 through L-2 fusion and T-12 through L-2 fixation. In this third surgery on Plaintiff, he removed the Pyramesh cage, drilled away the bone remaining at L-1, and replaced the mesh cage

and bone with a tibia allograft bone. Dr. Grundmeyer then replaced the screws and rods to support the new bone graft. Dr. Grundmeyer felt it was necessary to do this surgery or else Plaintiff would likely develop or continue to develop problems including urinary retention, leg pain, and some type of permanent spinal cord injury.

At some point after this surgery, Dr. Grundmeyer placed Plaintiff on restrictions of frequent lifting, pushing or pulling a maximum of 10 pounds, occasional lifting, pushing or pulling of a maximum of 20 pounds, no repeated bending or twisting of the back, kneeling, squatting, stooping, crawling, climbing and no prolonged sitting, standing, or walking. Dr. Grundmeyer testified that Plaintiff would not have been able to return to work with these restrictions until May 16, 2002.

Prior to his surgery in February of 2002, Plaintiff was unable to carry laundry or groceries; he had to drag trash bags to the outside container, and he could not lift items like chickens or pizzas out of the oven.

Dr. Grundmeyer states that Plaintiff will never be able to return to work without restrictions. Plaintiff suffers from a permanent kyphotic deformity of his back where the fracture occurred. This deformity will cause chronic back pain and muscle spasms.

Plaintiff returned to work on November 26, 2001, and took 3.45 hours of paid sick leave per day for most days from November 26, 2001, through January 4, 2002. The amount of sick leave he took thereafter is reflected in Pl. Exh. N.

State Farm's policies provide that "if an employee believes an accommodation of a physical or mental impairment is needed to perform his or her job, the employee should complete an Accommodation Request Form." State Farm requires all accommodation requests to be made in writing to the ADA Accommodation Request Review Committee. The Committee is composed of State Farm HR professionals and Dr. Stephen Kindred, State Farm's Medical Director. Dr. Kindred's role on that Committee is to serve as a medical consultant and evaluate the medical information presented.

Under the State Farm ADA Accommodation Request Review procedure, all requests for accommodation are to be made in writing on an ADA Employee Questionnaire. After a State Farm employee has filled out the proper form, the employee's supervisor completes the ADA Management Questionnaire and the local HR representative completes the ADA Human Resources Questionnaire. Those questionnaires are then sent to the State Farm ADA Accommodation Request Review Committee in Bloomington, Illinois, along with the employee's medical information and any other pertinent information. The ADA Accommodation Request Review Committee then reviews the request and makes a decision. The decision is then communicated to local management and the local State Farm HR representative. The State Farm HR representative then prepares a memo to the employee who made the request, informing them of the decision.

The formal ADA Accommodation Request Review procedure at State Farm is the only way by which

State Farm employees are allowed to request accommodations.

On February 5, 2002, when the ADA Accommodation Request Review Committee reviewed Lara's request for the accommodation of being excused from climbing roofs, the Committee understood that it would take Plaintiff at least three months to recover from his upcoming surgery.

On February 12, 2002, Dr. Kindred sent a memo marked "Personal and Confidential" to Patty Boomgarden, Senior Benefits Administration Specialist at State Farm, concerning Plaintiff. In that memo, Dr. Kindred stated that "I have reviewed the current medical information concerning this individual. This includes total and permanent disability from employment." The memo further stated that "If all other criteria are met, this individual would be eligible for Extended Benefits [apparently referring to disability benefits available under State Farm's Employee Benefit Plan]." It also stated "Review of this should be in one year with an Attending Physician's Statement completed at that time."

On February 12, 2002, Dr. Kindred signed a memo in which he indicated Plaintiff was "incapable of continuing his/her employment with the Companies due to any medically determinable physical or mental impairment which may be expected to result in death or to be of long, continued, and indefinite duration." On February 13, 2002, Kelly Winslow, Assistant HR Manager for State Farm, sent an e-mail to Scott Emeola, the local HR Representative for State Farm, stating that she understood that Plaintiff's surgery on

February 9 appeared to be successful and that "he would be back to work in a few months."

On February 13, 2002, Todd Osborne wrote an e-mail to Bill Rieker at State Farm in which he recommended that Plaintiff's employment be terminated because his paid sick leave had run out and he was unable to return to work without restrictions. In that e-mail, Osborne also noted that "the most probable time period before [Lara] could perform all of the Field Claim Representative job description is 3-6 months from now,..."

Plaintiff was granted disability benefits by CIGNA effective February 16, 2002, the date of his termination.

On January 11, 2002, Plaintiff had had a conversation with Scott Emeola in which Emeola told Plaintiff that "once his PSL [paid sick leave] runs out and he can't return to work without restrictions, his employment is terminated."

On February 4, 2002, Plaintiff had another conversation with Emeola in which they talked about whether Plaintiff would be eligible for unpaid medical leave when his paid sick leave ran out after his upcoming surgery. Plaintiff also asked if he could use his accrued vacation time after his paid sick leave expired.

On February 5, 2002, Emeola sent an e-mail to Annette Jackson, a State Farm HR consultant, asking about whether Plaintiff could be given any additional leave once his paid sick leave ran out. In this e-mail, Emeola asked:

> "In other words, could management, once his PSL [paid sick leave] expires, put him on unpaid Leave of Absence until he can return to work part-time/light duty, then allow him to work within his restrictions until he fully recovers? I know what this really amounts to is an accommodation. Do you recommend we do something like this?"

Later on February 5, 2002, Annette Jackson replied to Emeola's e-mail telling Emeola that she was not in favor of making an exception to the Illness Benefits Expired policy for Lara. Annette Jackson subsequently had conversations about this subject with Emeola and with Kelly Winslow when she repeated her opinion that an exception to the Illness Benefits Policy should not be made for Lara. Annette Jackson understood at that time that Plaintiff's impairment was expected to prevent him from working for approximately three months.

On February 19, 2002, Emeola, Osborne and Rick Beckler (the Team Manager and Lara's supervisor), went to Lara's home to tell him that his employment with State Farm was terminated. Plaintiff was still at home recovering from his third back surgery. Emeola told Plaintiff that since his sick leave had expired and he was unable to return to work without restrictions, his employment with State Farm was terminated for Illness Benefits expired. During this meeting, Plaintiff again asked about whether he could be granted medical leave or take his accrued vacation time rather than be terminated. Emeola replied that neither option was allowed by State Farm policies.

The purpose of the Fire Claims Representative position at State Farm is "within an assigned area of responsibility, to investigate, evaluate, negotiate and settle Fire and Allied Lines and General Casualty claims presented to State Farm Fire and Casualty Company (with the exception of automobile claims) and the State Farm General Insurance Company." Fire Claims Representatives at State Farm handle a broad variety of claims, including claims stemming from theft, water damage, fire, smoke damage, vandalism, storm damage, explosions and flooding.

Fire Claims Representatives could investigate claims involving roof claims by personally inspecting the damage, or, as explained more fully below, by having a Structural Damage Estimator inspect the damage, by having a Preferred Service Provider inspect the damage, or by having another Fire Claims Specialist inspect the damage.

State Farm employs Structural Damage Estimators ("SDE's") to handle some claims. SDE's handle similar claims to Fire Claims Representatives but do not handle claims where coverage issues may arise. As needed, SDE's also perform property or roof inspections and provide the results of their inspection to the Fire Claims Specialist who will then evaluate, negotiate, and settle the claim. Fire Claims Representatives could use SDE's to perform site inspections. n1

State Farm also has relationships with certain approved contractors who are designated as "Preferred Service Providers" ("PSP's"). If a State Farm insured chooses to use a State Farm PSP to do their repair

work, the PSP is responsible for performing the investigation, determining the nature and scope of repair work to be done, and then performing the repairs. In most cases where a PSP is used, State Farm does need to send a fire claims specialist to perform an inspection of the property, although State Farm may send a claim specialist to inspect such a site if a problem develops or to ensure that the PSP is estimating accurately.

Steve Short made the decision to terminate Plaintiff's employment with State Farm because Plaintiff's illness benefits had expired. Short did not believe that he or anyone else at State Farm had any authority to grant Plaintiff unpaid leave instead of terminating him when his illness benefits expired. Short was not aware that Plaintiff had requested additional leave in lieu of his termination.

Short knew at the time he made the decision to terminate Plaintiff that Plaintiff was suffering from a disability.

State Farm began searching for a replacement for Plaintiff in March of 2002. Ultimately, Tammy Konzem was hired as a Fire Claims Representative to fill the opening left by Lara's termination. Ms. Konzem was a teacher in the Hutchinson school district at the time of her interview. She did not start in her position as Fire Claims Representative with State Farm until June 3, 2002.

Every State Farm Fire Claims Representative is required to take certain training before they may begin their duties. These courses are the Fire Claims

Training Series I and II, successful completion of the Fire Claims and Estimating School, and the Computer Based Training "estimatics modules." The Fire Claims Training Series I takes approximately two to three months to complete. The Series II training takes an additional one to two months to complete and cannot be started until Series I training is completed. The Fire Claims and Estimating School is a one week course held at Bloomington, Illinois, at least monthly. This school cannot be attended until the employee has completed both the Series I and II Fire Claims Training. The computer-based training "estimatics modules" is a self-directed course of study on CD-ROM's that must be completed before attending the Fire Claims and Estimating School but can be done concurrently with the Fire Claims Training Series. In total, a Fire Claims Representative must complete three to four months of training before they can begin to handle claims on their own.

Ms. Konzam started work with State Farm on June 3, 2002, and thereafter had to complete three to four months of training before she could begin handling claims on her own.

State Farm had a number of positions other than Fire Claims Specialist positions open during 2002. In May of 2002, State Farm had two positions open for an Agency Specialist in Wichita. In June of 2002, State Farm had a position for an Automotive Claims Specialist open in Wichita. In August of 2002, State Farm had another Agency Specialist position open in Wichita. Also sometime in 2002, State Farm had two open positions in Wichita for Financial Services Product Associates and one position for a Life Sales specialist.

The position of Automotive Claims Specialist does not involve climbing on roofs. It only involves minimal bending, stooping, and lifting. The Skills/Abilities for this position include "ability fo exercise sound judgment regarding claim settlement values; ability to communicate effectively with claimants, insureds, employers, police, witnesses, agents, auto repair firm personnel, attorneys, medical providers, and personnel of other insurance companies; ability to develop and analyze data needed to determine liability or the company's obligation under the insurance policy; [and] as appropriate to the claims assigned, ability to interpret, evaluate and, in some cases, write auto damage repair estimates (requires walking, reaching, bending, stooping, and lifting objects typically weighing less than 50 lbs.)

The position of Agency Specialist has no physical demands such as lifting, bending, or stooping, and does not require climbing on roofs. The Skills/Abilities listed for this position include "ability to participate as an effective team player; strong listening, oral, and written communication skills; ability to relate well with people at all levels of the organization, [and] enthusiastic about opportunities to help agents attain their goals." They help agents develop marketing plans and provide some training to agents on new products.

Prior to his termination, Lara had discussed with Emeola his interest in finding another position at State Farm that he might be able to fulfill. Specifically, Lara expressed interest to Emeola in a new position which was being created called a Field Compliance Coordinator. Those positions were posted at State

Farm in February of 2002. Plaintiff was not given one of those positions.

The position of Field Compliance Coordinator has no physical demands such as lifting, bending or stooping and does not require climbing on roofs. The Skills/Abilities for this position include "strong communication skills: reading, writing, speaking to groups; ability to interact well with people and build good working relationships with agents, agents' staff, and others, [and] ... demonstrates ability to work with minimal direct supervision."

Prior to Lara's termination, Emeola asked him if he would have any interest in a position with Fire Claims Central in Tulsa, Oklahoma. Lara said that he could not relocate to Tulsa because he has three children whose custody he shares with their mother who lives in Wichita. In fact, there was not an open position at Fire Claims Central at the time, although openings in that operation came up fairly frequently.

Most positions at State Farm are not advertised or made publically known. Instead, open positions are first posted on the State Farm intranet for which access is restricted to State Farm employees only. State Farm employees can then apply for other positions at State Farm that interest them. If the position is not filled with an internal candidate, State Farm will look at its files of prospective candidates compiled from job fairs and other applications and contact those that appear qualified about the opening.

Since his termination from State Farm, no one from State Farm has contacted Lara to tell him about any

opening that existed at State Farm. Nor has Plaintiff had access to the State Farm intranet to see what openings have been posted.

After his termination, Lara applied for the position of Financial Services Product Associate with State Farm which was advertised on the internet. He was not selected for that position.

In the past, State Farm has excused Fire Claims Representatives from climbing on roofs because of pregnancy or injury. Todd Osborne was excused from climbing on roofs for about a month as a Fire Claims Representative while he recovered from a broken foot. In or around 1993, one former Fire Claims Representative was excused from climbing on roofs for several months (Tamera Trangott) and another was excused for several years (Browne Joy).

II. *Summary of Arguments.*

In moving for summary judgment, State Farm argues Plaintiff has failed to establish a *prima facie* case of discrimination because he cites no evidence that his impairment was of sufficient duration or permanence to constitute a disability, and because he fails to show that the impairment substantially limits a major life activity. It further argues that he could not perform the essential functions of a Fire Claims Representative - with or without reasonable accommodation - and was therefore not a "qualified individual" under the ADA. State Farm also contends Plaintiff's claim is barred by estoppel because Plaintiff applied for and received long-term disability benefits. It argues that Plaintiff's application for such benefits is inconsistent with the

claim that he can perform the essential functions of a Fire Claims Representative if granted a reasonable accommodation. Finally, with respect to Plaintiff's claim for injunctive relief, which is premised upon an argument that State Farm's accommodation policies constitute a *per se* violation of the ADA, State Farm argues that its policies are consistent with ADA requirements. Plaintiff's response brief argues that there is a genuine issue of material fact as to each of the foregoing issues.

III. *Summary Judgment Standards.*

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c).* Under *Rule 56*, the moving party initially bears the burden of making a prima facie showing of the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law. *See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998).* This burden may be satisfied by pointing to an absence of evidence on an essential element of the non-movant's claim. *Id. at 671* (*citing Celotex, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548*). Once the moving party carries this burden, the opposing party cannot simply rest upon the pleadings; it must come forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).*

IV. *Discussion.*

A. *Background.*

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to ... [the] terms, conditions, and privileges of employment." *42 U.S.C. § 12112(a).* The Act defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *§ 12111(8).*

Under the Act, "disability" means:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *42 U.S.C. § 12102(2).* "Major life activities" refers to those activities that are of central importance to daily life. *Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 197, 151 L. Ed. 2d 615, 122 S. Ct. 681 (2002).* To be "substantially limited," an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term. *Id. (citing 29*

CFR § 1630.2 (j)(2)(ii)-(iii) (2001)). Whether a given impairment substantially limits a major life activity is determined on an individualized case-by-case basis. *Rakity v. Dillons Companies, Inc., 302 F.3d 1152 (10th Cir. 2002).* The court must also take into account the effects of mitigating or corrective measures when judging whether a person is substantially limited in a major life activity. *Id.* (citing *Sutton v. United Air Lines, Inc., 527 U.S. 471, 482, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999)).*

B. *Whether Plaintiff was an Individual with a Disability.*

The parties agree that Plaintiff's back condition constitutes a physical impairment. Plaintiff argues that the impairment substantially limited him in the major life activities of lifting, performing manual tasks, and working. Doc. 60 at p. 31.

As noted above, the ADA was intended to apply to impairments whose impact is permanent or long term in nature. *Toyota Motor Mfg., supra.* For this reason, numerous cases have concluded that a temporary impairment -- including a surgery-related absence from work and resulting short-term working restrictions -- does not constitute a disability within the coverage of the ADA. *See Everist v. Blue Cross & Blue Shield of Ks., Inc.*, No. 98-4041, *2000 WL 1708504 (D. Kan. Oct. 20, 2000*); *Rebarchek v. Farmers Co-Op. Elevator & Merc. Assoc., 60 F. Supp.2d 1145, 1151 (D. Kan. 1999). See also Pollard v. High's of Baltimore, Inc., 281 F.3d*

462, 468 (4th Cir. 2002) (citing cases). Plaintiff's condition was arguably a temporary impairment, because at the time of his termination his inability to lift or to work was due to recent surgery, and it was hoped that the surgery would eventually reduce or eliminate the impairment. But a severe, non-permanent condition may rise to the level of a disability under the ADA where the duration of the condition is indefinite and unknowable or is expected to be at least several months. *Aldrich v. Boeing Co., 146 F.3d 1265, 1270 (10th Cir. 1998). See also 29 C.F.R. § 1630.1,* App. (EEOC Interpretive Guide). After reviewing the evidence in the record, the court concludes there is a genuine issue as to whether plaintiff's back condition was a long-term impairment that substantially limited him in the major life activity of lifting. Plaintiff's impairment began in May of 2001 with the burst fracture of his L-1 vertebra, and there is evidence that for an extended period thereafter he was unable to lift even light objects. The impairment necessitated two surgeries in September of 2001 and a recuperative period thereafter. Among other things, he was initially restricted from lifting more than 10 pounds. He was eventually cleared to begin light duty on November 26, 2001, but was restricted from lifting more than 20 pounds or from climbing ladders or roofs. State Farm accommodated Plaintiff during this time by allowing him to work part-time at a desk job processing claims that did not require strenuous inspection. Plaintiff continued to use sick leave during this period, and his condition gradually deteriorated. Prior to his third surgery in February of 2002, Plaintiff was unable to carry laundry or groceries; he had to drag trash bags to the outside container, and he could not lift items like chickens or pizzas out of the oven. On February 9, 2002,

Plaintiff underwent surgery to replace the Pyramesh cage that had been installed in his prior surgeries. The cage apparatus was not working as planned and was putting pressure on Plaintiff's spinal cord, causing pain and other problems. Without surgery Plaintiff likely would have continued to deteriorate and would have developed increased neurological problems and a permanent spinal cord injury. The record is somewhat vague concerning Plaintiff's prognosis immediately after his third surgery when State Farm terminated him. n2 There is some evidence that Plaintiff informed State Farm it would take from 3-6 months and possibly longer to recover from the surgery. Dr. Grundmeyer, Plaintiff's treating physician, confirmed in his deposition that given Plaintiff's condition and the type of surgery involved it was likely to be at least three months before Plaintiff could return to any type of work and that progress thereafter was dependant upon individual circumstances. Grundmeyer indicated that Plaintiff's estimated return to work date could not be determined as of February 22, 2002 (shortly after the surgery), and that three months after surgery was a more appropriate time to make an evaluation. He testified that for a redo fusion surgery of this type, three months was the minimum period before a return to light duties could be expected and that such a patient would have various restrictions at that point including no repetitive lifting of more than 10 pounds, maximum lifting of 20 pounds, and no squatting, crawling, or climbing. Progress thereafter would depend largely upon individual circumstances and progress. n3

Viewing this and the other evidence in the light most favorable to Plaintiff, a reasonable jury could conclude that Plaintiff's impairment severely restricted his

ability to lift as compared to the capability of the average person, and that it was long-term or indefinite in duration, having lasted approximately one year from its onset with no reasonably certain recovery time as of the date of his termination from State Farm. *Cf. Aldrich, supra.* The record thus gives rise to a genuine issue of fact as to whether Plaintiff had a disability. In view of this conclusion, the court need not address Plaintiff's contention that he was also severely restricted in his ability to perform manual tasks or to work.

C. *Whether Plaintiff was a Qualified Individual, and Whether State Farm Failed to Reasonably Accommodate Him.*

Plaintiff claims that State Farm should have granted him three months additional leave as an accommodation, arguing that this would have allowed him time to recover from surgery and to return to work. In so arguing, Plaintiff overlooks the fact that the three month recovery period was merely a minimum estimate of when he would be capable of returning to *light* duty; it was not an estimate of when he would again be able to perform the essential functions of a Fire Claims Specialist. In fact, the estimate provided to State Farm was that the recovery period could take up to six months, and it included no medical assessment that he would likely be able at that point to perform all of the essential functions of his job. With respect to granting leave generally, "an allowance of time for medical care or treatment may constitute a reasonable accommodation" under the ADA. *Rascon v. U S West Communs., 143 F.3d 1324, 1333-34 (10th Cir. 1998) (citing Hudson v. MCI Telecommunications Corp., 87*

F.3d 1167, 1169 (10th Cir. 1996). But the courts have uniformly held that employers are not obligated to retain a disabled employee on unpaid leave indefinitely or for an excessive amount of time. *See Boykin v. ATC/Vancom of Colorado, L.P., 247 F.3d 1061, 1065 (10th Cir. 2001)*. In this instance, the leave sought by Plaintiff was essentially indefinite, as there was no reasonable estimate of when Plaintiff would again be able to perform his job. *Cf. Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999)*; *Rascon, 143 F.3d at 1334* ("An indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment."); *Hudson v. MCI Telecomm. Corp., 87 F.3d 1167, 1169 (10th Cir. 1996)* (unpaid leave was unreasonable accommodation where plaintiff failed to present evidence of the expected duration of her impairment or her prognosis). As noted in *Cisneros v. Wilson, 226 F.3d 1113, 1130 (10th Cir. 2000)*, if the employee fails to provide an expected duration *of the impairment*, the employer cannot determine whether an employee will be able to perform the essential functions of the job in the near future and cannot assess whether the leave request is reasonable. Even assuming that six months represented the point at which a full recovery from Plaintiff's impairment might reasonably be expected, such an assumption would not avail Plaintiff because the courts have found that requiring an employer to grant leave for six months as an accommodation is an excessive amount of time. *See Boykin, 247 F.3d at 1065* (*citing Scheer v. City of Cedar Rapids, 956 F. Supp. 1496 -1501*-02 (N.D. Iowa 1997) (request that position be held open indefinitely until plaintiff had been seizure-free for six months was not reasonable accommodation) *and EEOC Enforcement Guidance* (suggesting that six

months is beyond a reasonable amount of time)). The unreasonable nature of this request is compounded by other factors shown by the record, including the fact that Plaintiff had already exhausted all of his available medical leave and State Farm was concerned because it was approaching the busiest time of the year for property damage claims and needed trained inspectors in the field. n4 Moreover, in connection with Plaintiff's appeal to State Farm to reconsider its termination decision, Plaintiff submitted flatly contradictory medical assessments, including one that falsely stated he could return to work as of February 18, 2002, without restrictions. In sum, a grant of additional leave until Plaintiff fully recovered was not a reasonable accommodation under the facts of this case, and State Farm's failure to grant such leave did not amount to unlawful discrimination.

Plaintiff's second contention -- that State Farm could have accommodated him by excusing him from roof claims or by arranging for someone else to perform roof inspections on claims assigned to him n5 -- is likewise unavailing. As an initial matter, it is clear from the record that performing roof inspections is an essential function of a Fire Claims Specialist. n6 Plaintiff's deposition testimony shows that climbing up and physically inspecting roofs was a frequent and necessary task for inspectors in the field. *See e.g.* Pl. Exh. OO at p. 23. State Farm has likewise cited evidence that Fire Claims Specialists in this part of the country must deal extensively with wind and hail damage to roofs, and that such claims constitute perhaps half of all field claims. *See* Pl. Exh. B. at p.3. *Cf. 29 C.F.R. § 1630.2(n)* (defining essential function). Contrary to Plaintiff's suggestion, the fact that State

Farm sometimes had its Structural Damage Estimators or outside contractors perform roof inspections on certain types of claims does not suggest that roof inspections were a marginal function of the Fire Claims Specialist position. Under the circumstances, State Farm was not required to accommodate Plaintiff by re-arranging the duties of his position or by having someone else take over and perform the inspection duties he was unable to perform, even if the company had occasionally undertaken such accommodations in the past. n7

"The idea of accommodation is to enable an employee to perform the essential functions of his job; an employer is not required to accommodate a disabled worker by modifying or eliminating an essential function of the job." *Mathews v. Denver Post, 263 F.3d 1164, 1168-69 (10th Cir. 2001).* Of course it is always possible for an employer to arrange to have some other employee perform an essential function that a particular employee with a disability cannot perform. But the duty of reasonable accommodation does not require the employer to shift an essential function of the job to other employees. *See Frazier v. Simmons, 254 F.3d 1247, 1261 (10th Cir. 2001)* ("we hold that reassigning these [essential] functions to another investigator in the office or other state employees is not a reasonable accommodation."). *See also Milton v. Scrivner, Inc., 53 F.3d 1118, 1124-25 (10th Cir. 1995)* (employer is not required to reallocate job duties in order to change the essential function of a job) *and Smith v. Midland Brake, Inc., 180 F.3d 1154, 1174 (10th Cir. 1999)* (en banc). Plaintiff is essentially arguing that State Farm should have created a new light duty position for him that would not involve roof inspections. *Cf. Mathews,*

263 F.3d at 1169. The cases cited above make clear that such an accommodation is unreasonable as a matter of law. *Frazier, 254 F.3d at 1261*. Accordingly, State Farm's failure to excuse Plaintiff from inspecting roofs did not constitute unlawful discrimination, as the suggested accommodation was unreasonable and Plaintiff could not otherwise perform the essential functions of his position.

Plaintiff's third argument concerning accommodation is that State Farm could have reassigned him to another position within the company. Pl. Br. at p. 53. He argues that State Farm failed to consider him for any other position after his termination and thereby failed to offer a reasonable accommodation. *Id.* Plaintiff specifically argues that he was qualified for an Agency Specialist position, a position that required no bending, stooping or lifting.

If an employee, because of a disability, can no longer perform the essential functions of the job he has held, the duty of reasonable accommodation may require his employer to reassign the individual to another vacant job for which the person is qualified. *Smith v. Midland Brake, Inc., 180 F.3d 1154, 1162 (10th Cir. 1999)*. Once an employee communicates to his employer a desire for reassignment, both parties have an obligation to "proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company and, if so, to identify an appropriate reassignment opportunity if any is ... available." *Id. at 1172*. Viewing the evidence in the light most favorable to Plaintiff, a reasonable jury could find that Plaintiff expressed his desire for reassignment

to State Farm. A jury could also find from the evidence that State Farm failed to fully examine and apprize Plaintiff of whether there were any vacancies to which he could be reassigned when it terminated him under its leave policy without having its Accommodation Committee review his situation. But even if State Farm failed to fully comply with the "interactive" process contemplated by the ADA, Plaintiff would not be entitled to prevail unless he could show that a reasonable accommodation was possible and would have led to a reassignment position. *Id. at 1174*. This requires a showing that there was a vacant position for which Plaintiff was qualified at the time of his termination. *See Bristol v. Bd. of County Comm'rs of Clear Creek, 281 F.3d 1148, 1167 (10th Cir. 2002)* (relevant time for determining whether there was vacant position was at the time of termination), *vacated in part on other grounds, 312 F.3d 1213*. A "vacant position" includes not only one that is at the moment vacant, but also one that the employer reasonably anticipates will become vacant "in the fairly immediate future." *Smith, 180 F.3d at 1175*. Under the evidence cited, however, Plaintiff was not qualified for any position at the time of his termination nor would he have been qualified in the "fairly immediate future," because he needed a minimum of three months after his surgery before he could perform even light duties. Plaintiff identifies a number of positions that opened up at State Farm in May, June and August of 1992, but such positions were vacant 3-6 months after his termination, which cannot reasonably be construed as the "fairly immediate future." *Cf. 29 C.F.R. § 1630*, App., *Section 1630.2(o)* (if the employer knows that an equivalent position will become vacant next week, the employer should reassign the individual to the position

when it becomes available). Nor has evidence been cited that State Farm knew of these positions when it terminated Plaintiff in February of 2002. *See Bristol, 281 F.3d at 1168* (duty of reassignment requires evidence of employer's subjective knowledge of upcoming opening). Plaintiff also points out that several Field Compliance Coordinator positions were posted at State Farm in February of 2002. But again, Plaintiff was not able to work until several months after his surgery in February, and he was thus not qualified for these positions when they were vacant. Finally, Plaintiff notes that he has been turned down for one or more positions at State Farm since his termination. No claim appears to be made, however, that such employment decisions were made on account of a disability, and no evidence is cited to substantiate such a claim. In sum, the court concludes that Plaintiff has not raised a genuine issue of fact as to whether State Farm failed to reasonably accommodate him by transferring him to a vacant position within the company.

D. *Additional Arguments.*

Because Plaintiff has not shown a genuine issue of fact as to whether State Farm actually failed to reasonably accommodate him, his additional claim that State Farm's "Illness Benefits Expired" termination policy was contrary to the ADA's mandate of reasonable accommodation fails as a matter of law. Also, in view of the court's conclusion that Plaintiff has failed to show the elements of a claim for discrimination, the court need not address State Farm's argument that Plaintiff is estopped from asserting a claim under the ADA by

reason of his application for long-term disability benefits.

V. *Conclusion.*

Defendant State Farm's Motion for Summary Judgment (Doc. 51) is hereby GRANTED. The clerk is directed to enter judgment reflecting that plaintiff Brian Lara is to take nothing, and that the action is hereby dismissed on the merits.

IT IS SO ORDERED this 24th Day of July, 2003, at Wichita, Ks.

Wesley E. Brown

United States Senior District Judge

Footnotes

n1 According to the deposition of Steve Short, the State Farm vice-president who approved the decision to terminate Plaintiff's employment, when claims are received by State Farm they are usually referred to one of State Farm's centralized offices known as "fire claims central." Screeners at these central offices review incoming claims and determine whether they should be assigned to fire claims central or to a field office. Simple claims are typically handled by fire claims central. More complex claims that likely require more scene investigation and work with attorneys are assigned to a field office. The primary function of SDE's [Structural Damage Estimators, referred to above] is to be the "eyes and ears" of fire claim central claim representatives, and to perform field inspection and

write damage estimates for fire claims central. They also receive some assignments from field offices.

n2 State Farm's ADA Accommodation Committee tabled Plaintiff's request for accommodation in view of Plaintiff's impending third surgery, and it apparently failed to gather much information on Plaintiff's prognosis before Plaintiff was terminated on February 16, 2002. State Farm subsequently gathered additional information on Plaintiff's prognosis in connection with an appeal by Plaintiff of his termination.

n3 Dr. Grundmeyer testified that Plaintiff was in fact experiencing low back pain three months after his surgery, that the pain increased with activity, and that Plaintiff was experiencing intermittent back spasms. He said Plaintiff was slowing improving at that point and was capable of returning to an office setting for a limited time, but that it would be another six to eight weeks thereafter before a lessening of restrictions could be evaluated. At six months after surgery, Plaintiff had chronic complaints of back pain, and he developed an infection that was causing pain. Dr. Grundmeyer stated that in late August of 1992 Plaintiff was capable of working in a sedentary office setting with various limitations, including no prolonged sitting, standing or ambulation, heavy lifting, or bending or twisting. According to Dr. Grundmeyer, Plaintiff is likely to have chronic back pain and back spasms in the future due to a mild deformity in his spine from the initial injury.

n4 Plaintiff argues that a leave of three months would have been reasonable because it would take State Farm that long to train a replacement for him. The lengthy

training time for a replacement, however, underscores State Farm's need to know sooner rather than later if Plaintiff was going to be able to perform the inspection duties of his job within a reasonable time after surgery.

n5 In addition to this reassigning or rearranging of one of the essential functions of Plaintiff's position, this requested accommodation, like the others suggested by Plaintiff, would also have required State Farm to grant 3-6 months of additional leave to allow Plaintiff time to recover from surgery.

n6 The record indicates that bending, crawling and stooping were also essential functions for this position. For example, Plaintiff conceded in his deposition that he spent approximately 20% of his time on home inspections bending, crawling or stooping, and that such activities were necessary to assess the damage on property claims. *See e.g.* Pl. Exh. OO at Pp. 23-32.

n7 Scott Emeola noted in his deposition that State Farm did not want to continue excusing Plaintiff from roof inspections after his third surgery "because at that point it had been several months that Brian had not been doing that [roof inspections]" and "everybody else in the unit had to pick up the load, had to have more roof inspections." Pl. Exh. EE at p. 42. *Cf. Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995)* (an accommodation that would result in other employees having to work harder or longer hours is not required).

No. 03-3248

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIAN LARA,
Plaintiff-Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY,
Defendant-Appellee.

ORDER

February 17, 2005, Filed

Before: McCONNEL, McKAY, Circuit Judges, and FRIOT*, District Judge.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by:
Deputy Clerk

Footnotes

* The Honorable Stephen P. Friot, United States District Judge for the Western District of Oklahoma, sitting by designation.

Supreme Court, U.S.
FILED
JUN 20 2005
OFFICE OF THE CLERK

No. 04-1577

In The

Supreme Court of the United States

BRIAN LARA,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employee who has received nine months of leave, and continues to request additional leave for an uncertain length of time to cure his alleged disability, is entitled to indefinite leave as a reasonable accommodation under the Americans with Disabilities Act.

CORPORATE DISCLOSURE STATEMENT

I. Respondent State Farm Fire & Casualty Company's Parent Corporation: State Farm Mutual Automobile Insurance Company.

II. Publicly Held Companies Owning Ten Percent or More of Respondent State Farm Fire & Casualty Company's Stock: None.

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STATEMENT OF THE CASE

Petitioner Brian Lara ("Lara") alleges Respondent State Farm Fire & Casualty Company ("State Farm") failed to accommodate Lara's alleged disability and terminated his employment in violation of Title I of the Americans with Disabilities Act ("ADA"). 42 U.S.C. §§ 12101-12213.

Lara worked for State Farm in Wichita, Kansas as a Fire Claims Representative ("Claims Rep"). (Pet.'s App. 2a.) As a Claims Rep, Lara's duties required "walking, climbing, bending, reaching, stooping, crawling and lifting objects typically weighing less than 50 lbs." (Pet.'s App. 2a.)

After sustaining a non-job related injury in May 2001, Lara underwent three surgeries and used over 130 full days of paid sick leave from May 2001 through February 2002. (Pet.'s App. 2a-3a.) State Farm dismissed Lara on February 16, 2002, pursuant to its Illness Benefits Policy, because Lara's illness benefits expired. (Pet.'s App. 3a and 5a.) State Farm's Illness Benefits Policy states as follows: "once PSL [Paid Sick Leave] and/or ML [Medical Leave] expires, the employee should be terminated [on grounds of] Illness Benefits Expired . . . since it has already been determined that there will not be a return to work." (Pet.'s App. 3a.)

State Farm also has a policy that "if an employee believes an accommodation of a physical . . . impairment is needed to perform his . . . job, the employee should complete an Accommodation Request Form." (Pet.'s App. 3a.) State Farm requires all employees needing an accommodation to submit accommodation requests in writing. (Pet.'s App. 3a.)

Lara completed an Accommodation Request Form ("Request") on January 11, 2002 requesting, as an accommodation, "no roof claims until directed by the doctor", and stated on the form that his "physical impairment is temporary!" (Pet.'s App. 3a and 19a.) After completing the Request, Lara underwent his third and final surgery on February 9, 2002. (Pet.'s App. 4a.) Lara's sick leave expired during this recovery period. (Pet.'s App. 4a-5a.) After Lara's third surgery, State Farm's fire claim section manager sent an email to State Farm's fire claim manager based upon the diagnosis by Lara's doctor. The email stated Lara:

> will not be able to return to work without significant restrictions for an unknown amount of time. The most probable time period before he could perform all the Field Claims Representative job description is 3-6 months from now, although it is not known if he will ever be able to perform this job without restrictions.

(Pet.'s App. 5a.)

From Lara's initial May 2001 injury until his February 2002 termination, Lara provided State Farm with the following leave requests:

- May 31, 2001: stating Lara "Cannot Work" (Resp.'s App. 1);
- June 28, 2001: stating Lara "Cannot Work" with an "undetermined" return date (Resp.'s App. 2);
- July 9, 2001: stating "off work 6 wks" (Resp.'s App. 3);
- August 30, 2001: stating "Cannot Work" (Resp.'s App. 4);

- October 8, 2001: stating "Cannot Work" with an "undetermined" return date (Resp.'s App. 5);
- November 8, 2001 and December 20, 2001: limiting work to 4 hour work days (Resp.'s App. 6);
- **January 14, 2002: medical certification identifies "unknown" expected duration of Lara's impairment (received about three weeks prior to Lara's dismissal).** (Resp.'s App. 7-8) (emphasis added); and
- January 15, 2002: "may increase hours as tolerated." (Resp.'s App. 9.)

Lara submitted the following leave requests to State Farm **after his dismissal:**

- February 12, 2002: stating return to work date "unknown at this time. Approx. 3 months" (Resp.'s App. 10-11);
- February 18, 2002: stating Lara "May return to work on 2/18/02 without restrictions" (Resp.'s App. 12-13); and
- February 27, 2002 – placing Lara on restrictions for four weeks. (Resp.'s App. 13-14.)

Lara remained unable to perform the essential functions of a Claims Rep from the date of his dismissal, February 16, 2002, until May 13, 2002. (Pet.'s App. 6a.) Lara's treating physician, Dr. Raymond Grundmeyer, III, testified during his deposition that Lara could return to work in an office setting on May 15, 2002 with the following restrictions: "(a) frequent or repetitive lifting, pushing, pulling, a maximum of 10 pounds; (b) occasional lifting, pushing, pulling, a maximum of 20 pounds; (c) no

prolonged sitting, standing, walking; (d) no excessive and/or repeated bending or twisting of the lower back; and (e) no kneeling, squatting, stooping, crawling and climbing." (Pet.'s App. 7a.) The May 15th restrictions still prevented Lara from performing the essential functions of a Claims Rep.

A functional capability evaluation completed on August 8, 2002, approximately 14½ months after Lara's leave initially began and 6 months after Lara's dismissal, showed Lara could perform **light work** for 8 hours per day. (Pet.'s App. 7a.)

SUMMARY OF THE ARGUMENT

Lara alleges the Tenth Circuit's decision in *Lara v. State Farm Fire & Casualty Co.*, No. 03-3248, 2005 WL 288819 (10th Cir. Jan. 27, 2005) conflicts with a decision issued by the First Circuit. The decision from the First Circuit is distinguishable from the Tenth Circuit's decision in *Lara* for one major reason – the First Circuit employee requested leave with a specific date of return, whereas **Lara requested indefinite leave.**

Lara embraces the same rationale adopted by other Courts of Appeals – an employee's failure to provide to the employer the expected duration of the impairment essentially requests indefinite leave.

The ADA does not contemplate requests for indefinite leave as a "reasonable accommodation."

Lara's request to this Court to provide detailed guidance to employers and employees for requesting additional leave as an ADA reasonable accommodation is

unnecessary. The EEOC, and existing case law, provide ample guidance on the issue of requesting an accommodation. Providing detailed requirements for such accommodation requests would interfere with the "essential" individualized assessment mandated by claims under the ADA.

REASONS FOR DENYING THE PETITION

I. SIGNIFICANT DIFFERENCES EXIST BETWEEN *LARA* AND *GARCIA* NEGATING ANY ALLEGED CONFLICT BETWEEN THE TWO CIRCUITS' DECISIONS.

A. Lara Requested Indefinite Leave, Failing to Provide a Specific Return to Work Date. Lara alleged State Farm should have accommodated his alleged disability by providing additional leave of three to six months (in addition to the eight months State Farm already provided). (Pet.'s App. 9a and 41a-42a.) The estimates Lara provided to State Farm "included no medical assessment that he would likely be able at that point to perform all of the essential functions of his job." (Pet.'s App. 41a.) In support of Lara's leave request, he presented State Farm with "flatly contradictory medical assessments, including one that falsely stated he could return to work as of February 18, 2002, without restrictions." (Pet.'s App. 43a; *see also* Pet.'s App. 10a.) The Tenth Circuit held that Lara's request for additional leave, "was essentially a request for an indefinite leave." (Pet.'s App. 10a.)

In *Garcia-Ayala v. Lederle Parentereals, Inc.*, Lederle "had a policy of reserving a job for one year when employees had been out on [short term disability]." 212 F.3d 638,

642 (1st Cir. 2000). Lederle informed Garcia in June 1996 that her one-year job reservation period ran in March 1996, and Lederle terminated Garcia. *Garcia*, 212 F.3d at 642. Garcia requested additional leave for two months. *Garcia*, 212 F.3d at 647. Lederle rejected the request, and "embrace[d] a per se rule that any leave beyond its one-year reservation period was too long." *Garcia*, 212 F.3d at 649.

Contrary to the leave Lara requested, Garcia requested "additional leave time with a specific date for return." *Garcia*, 212 F.3d at 648. Therefore, the Tenth Circuit (*Lara*) and the First Circuit (*Garcia*) decisions reflect the rationale that "[w]ithout an expected duration of an impairment, an employer cannot determine whether an employee will be able to perform the essential functions of the job *in the near future*. . . . " *Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000), *overruled on other grounds by Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001). In other words, the failure to present evidence of the expected duration of the impairment directly impacts on the reasonableness of the employee's requested leave accommodation.

B. State Farm Challenged the Reasonableness of the Requested Accommodation. Lara alleges in his Petition for Writ of Certiorari that "no other court of appeals has imposed the requirement that the employee must provide the employers with the expected duration of his impairment in order to have his request for leave be considered a proper request for a reasonable accommodation under the ADA." (Pet. 8.) This statement contradicts even *Garcia*'s recognition that "the burden of showing **reasonable** accommodation is on the plaintiff." *Garcia*, 212 F.3d at 648 (emphasis added). In *Garcia*, Lederle did

not contest the reasonableness of the accommodation. *Garcia*, 212 F.3d at 649. In *Lara*, State Farm did object to the reasonableness of the requested accommodation because Lara requested indefinite leave.

The Tenth Circuit's decision in *Lara* reflects a similar decision from the Sixth Circuit that "when, as here, an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation." *Walsh v. United Parcel Service*, 201 F.3d 718, 727-28 (6th Cir. 2000) (citing *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996)). The *Walsh* court noted that its review of case law from all circuits "disclosed no cases where an employer was required to allow an employee to take a leave of absence for well in excess of a year – let alone indefinitely – as a reasonable accommodation to the employee's disability." *Walsh*, 201 F.3d at 727.

In *Walsh*, the employer gave an employee nearly 1½ years off from work, but the employee requested an additional ninety days off for an evaluation. *Walsh*, 201 F.3d at 727. Rejecting the employee's argument that he requested a reasonable accommodation of additional leave, the Sixth Circuit held that "when the requested accommodation has **no reasonable prospect of allowing the individual to work in the identifiable future**, it is objectively not an accommodation that the employer should be required to provide." *Walsh*, 201 F.3d at 727 (emphasis added). Walsh referenced a similar holding from *Hudson* that "where plaintiff has failed to present any evidence of the expected duration of her impairment as of the date of her termination, a request for medical leave